

Does Sorry Incriminate - Evidence, Harm and the Protection of Apology

Jeffrey S. Heimreich

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DOES ‘SORRY’ INCRIMINATE? EVIDENCE,
HARM AND THE PROTECTION OF APOLOGY

Jeffrey S. Helmreich*

Apology has proven a dramatically effective means of resolving conflict and preventing litigation. Still, many injurers withhold apologies because they have long been used as evidence of liability. Recently, a majority of states in the United States have passed “Apology Laws” designed to shield apologies from evidentiary use. However, most of the new laws protect only expressions of benevolence and sympathy, like “I feel bad about what happened to you.” They do not protect apologies that include expressions of remorse or self-criticism, such as “I should have prevented it.” These laws thereby reinforce a prevailing legal construal of apologies as partial proof of liability. This Article argues that the tendency to interpret apologies as incriminating, a tendency entrenched in evidence law and reinforced by the new state measures, misreads apologetic discourse in a crucial way. Drawing on developments in ethical theory, it argues that full, self-critical apologies do not imply culpability or liability because they are equally appropriate for blameless, non-negligent injurers. Neither the statement nor the act of an apology is probative of liability, and their admission has been premised on a mistake. This Article closes with a proposed means of protecting apologies from evidentiary use, modeled on Rule 409 of the Federal Rules of Evidence.

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INTRODUCTION

Recent years have seen an explosion in public examples of the power of apologies to resolve conflicts and avoid litigation.¹ Legal practice has been slow to respond.²

Until recently, apologies were routinely admitted as evidence to prove liability, which tended to discourage injurers from apologizing to

¹ See, e.g., AARON J. LAZARE, *ON APOLOGY* 5–11 (2005) (finding public apologies help resolve conflict); Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125, 143 (2009) (disclosing the results of a study by the University of Michigan Health System which found that honest disclosure reduces the instance of malpractice suits by more than 200%); Lucinda Jesson & Peter B. Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies*, 35 WM. MITCHELL L. REV. 2 (2009) (finding less dramatic results in Colorado hospitals and national insurance companies); Kevin Sack, *Doctors Say I'm Sorry Before 'See You in Court'*, N.Y. TIMES, May 18, 2008, at A1; see also MICHAEL S. WOODS & JASON I. STARR, *HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE* (2007) (suggesting that the chance of being sued was reduced by half when doctors apologize and disclose details of error).

² See, e.g., Boothman et al., *supra* note 1, at 132 (discussing senators failing to pass legislation in 2005 endorsing non-litigation resolution of medical malpractice claims).

their victims.³ In the past two decades, however, a new wave of legislation designed to counter this evidentiary disincentive has swept the United States and other countries.⁴ Beginning in 1986, a growing number of states have adopted what have been called "apology laws"—protective measures designed to encourage injurers to apologize by expressly ensuring that at least some types of apologies cannot be used against them in litigation.⁵

Most of these measures, nevertheless, stop short of protecting full apologies.⁶ In particular, they deny protection to expressions of remorse, guilt, and self-criticism, such as "I'm sorry I let that happen to you."⁷ They protect only expressions of good will, such as sympathy ("I'm sorry you're suffering") and benevolence ("I want to help you recover").⁸ If one apologizes solely by expressing these sorts of neutral sentiments, the new state measures provide that these words will not be used in court to prove liability.⁹ If, on the other hand, one speaks self-critically to the victims of one's accidental harms ("I should have found a way to stop this," or "I'm so sorry I didn't do a better job of preventing it") the utterances enjoy no special protection.¹⁰ That is, in part, because most of the laws are tailored not only to protect apologizers, but to preserve probative evidence of liability.¹¹ The new laws therefore deny protection to self-critical expressions such as "It was my fault," or "I should not have done that."¹²

In withholding protection from these self-critical remarks, the new reforms suggest that such statements are probative of liability, a reading they share with prior evidentiary practice.¹³ This interpretation takes sides in a larger debate about the meaning and role of self-critical apolo-

³ See *infra* notes 28–32.

⁴ See Jesson & Knapp, *supra* note 1, at 1430–32 (showing that after Massachusetts enacted an apology statute, other jurisdictions followed suit); Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 869–70 (2002) (discussing the importance of apology in Japan, New Zealand, and China).

⁵ See, e.g., ARIZ. REV. STAT. ANN. § 12-2605 (2005); CONN. GEN. STAT. ANN. § 52-184d (2010); FLA. STAT. § 90.4026 (2010); GA. CODE ANN. § 24-3-37.1 (2010); IOWA CODE § 622.31 (2010); VT. STAT. ANN. TIT. 12 § 1912 (2010); see also Cohen, *supra* note 4 (summarizing the emergence of these laws). For an important critical evaluation of the state measures, see Lee Taft, *The Commodification of Apology*, 109 YALE L.J. 1135 (2000).

⁶ See Jesson & Knapp, *supra* note 1, at 1425–26 (discussing what types of apologies are admissible).

⁷ See, e.g., Cohen, *supra* note 4, at 819–20.

⁸ *Id.*

⁹ See, e.g., CONN. GEN. STAT. ANN. § 52-184d (1958).

¹⁰ See, e.g., Cohen, *supra* note 4, at 819–20.

¹¹ See *id.* at 824–25.

¹² See *id.*

¹³ See Jesson & Knapp, *supra* note 1, at 1448 (noting lawyer concerns that disclosure "will make a bad decision worse").

gies.¹⁴ Can we sincerely express remorse, contrition and self-criticism if we believe we did nothing wrong? The current practice in evidence law, and especially the bulk of the new “apology laws,” suggests that doing so would misrepresent us as culpable or liable. The suggestion is that expressing guilt, remorse or self-criticism implies that one acted with fault.

Here I argue that such a reading misunderstands apologies and regret for blameless harm. Drawing on developments in moral theory, I will attempt to show that apologies and related expressions of guilt, remorse and self-criticism, such as “I should never have let that happen,” do not imply admissions of liability largely because they do not imply admissions of fault. They do not even imply that anything wrong was done at all. This is true for two reasons. First, a guilty or self-critical stance is appropriately directed even at one’s inadvertent, non-negligent inflictions of harm. From a moral point of view, that is an appropriate reaction in such cases, or so I will argue. Therefore, self-critical apologies do not imply an admission of liability, and both traditional legal practice and the new state reforms err in treating them as such. Second, apologizing is an appropriate moral remedy even for blameless harms. There are, in other words, sound moral reasons to apologize to those one harms blamelessly, which resemble the reasons to offer them aid or compensation. Such offers are protected by the Federal Rules of Evidence and analogous state rules.¹⁵ For the same reasons I will argue that apologies should enjoy protection. I will conclude with a simple suggestion for how such protection can be incorporated into legal practice, thereby improving upon the recent legislative efforts to protect and encourage apologies.

This Article proceeds in four Parts. Part I analyzes the status of apologies as evidence under current legal practice and the new state reforms known as “apology laws.” Part II constitutes the critique of the state measures and, consequently, the legal practice that they leave in place. First, it exposes their failure to protect self-critical expressions, such as “I regret what I allowed to happen,” or “I should have done better,” which reflects a reading of such statements as partial admissions of liability. Second, I argue that this reading is mistaken, because expressing self-criticism and even guilt does not imply actual guilt or culpability. Rather, such expressions reflect the speaker’s sense of having misused her efforts to avoid something, namely harming others, which moral agents are deeply invested in avoiding. Part III treats two notable objections to these arguments. Finally, Part IV proposes that legislative protection of apologies be expanded beyond the new state measures to

¹⁴ See *id.* at 1451 (comparing choice between erring on the side of caution and making a more sincere apology).

¹⁵ See, e.g., IOWA CODE ANN. § 622.31 (1946).

include self-critical remarks, along with nonverbal acts of apology otherwise admissible as circumstantial evidence. The proposal is modeled on Rule 409 of the Federal Rules of Evidence and its state versions.

I. THE BACKGROUND: EVIDENCE, CHILL, AND
THE POWER OF APOLOGY

A. *Apologies as Evidence*

Apologies have long been admitted to prove evidence of negligence liability.¹⁶ The term “apologies” here refers to statements uttered by injurers or wrongdoers to their victims with the intention that they be understood as apologies, or at least as expressions of remorse or regret over something the speaker did. Typically these statements include the phrase “I’m sorry,” as in “I’m sorry I injured you.” But they need not involve such familiar locutions; statements such as “I’ve been meaning to tell you how awful I feel about what I did to you” could be just as plausibly read as expressions of regret or remorse, and may even be understood as apologies, as well. They, too, qualify as apologies for purposes of this Article. Indeed, the term “apology” here is used as broadly as possible without stretching common usage.

Apologies on even the broadest possible understanding tend to occur in recognizable contexts. Specifically, they tend to be uttered by the apologizer to the apologizee. Often the utterance takes place out of court, which could make them hearsay. Generally, hearsay statements cannot be admitted to support civil or criminal liability.¹⁷ If so, then perhaps apologies need not be protected from evidentiary use because they are inadmissible. Apologies, however, tend to be admitted as a type of statement that lies outside the scope of the hearsay rule, known as an “admission by party-opponent.”¹⁸ By “admission,” evidentiary rules refer not to outright confessions, but to any statement which is “inconsistent with the party’s position at trial, relevant to the substantive issues in the case, and offered against the party.”¹⁹ For example, a physician accused of negligently performing an operation without taking reasonable care to obtain full consent may have said to one of his subordinates, “I will not be reading any more consent forms today.” That statement, together with other evidence (about other days, for example), could be used to establish that the physician did not read a form the patient had modified. The admission by itself does not prove the doctor liable, as it

¹⁶ See Cohen, *supra* note 4, at 819 (discussing the beginning of excluding apologies from evidence in the late 1990s).

¹⁷ See FED. R. EVID. 802 and analogous state rules.

¹⁸ See FED. R. EVID. 801(d)(2) and analogous state rules.

¹⁹ See CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 254 (Kenneth S. Broun ed., 6th ed., 2006).

does not assert his liability outright, but it admits a fact that could help establish, for example, that he did not take appropriate steps to remain within the scope of the patient's consent. The "admission by party-opponent" limit on the hearsay rule is meant to include statements like this one, which would be admissible as testimony, but which a party should not need to cross-examine or swear in because they are the party's own statements. Hence they are admitted despite having been uttered out of court.

Apologies, though perhaps also admissible on other grounds, tend to be construed as statements that a party has made which are inconsistent with the party's claims at trial.²⁰ Relying on this reading of apologies, courts have allowed into evidence out-of-court utterances by doctors to the patients they harmed, such as "this is a terrible thing I have done . . . I'm sorry"²¹ or "I'm sorry, [I] made a mistake and . . . it never happened before."²² Similarly, a Starbucks manager's apology to a customer, after apparently watching her get burned by spilled coffee, was admitted to prove the store's possible negligence.²³ A Colorado doctor's alleged post-operative statement to a patient's son that he was "sorry about [his] father's situation" was deemed admissible and a concession of fault.²⁴

While courts in these and other cases treat apologies as admissible to prove liability, that hardly shows they are ever sufficient to do so. One court reasoned that apologies could be decisive evidence of liability,²⁵ but most have found only that they can contribute to a finding of negligence together with further evidence.²⁶ In fact, in cases where apologies were offered as the sole evidence of liability, without an accompanying admission of negligent conduct, courts have mostly ruled that the evidence is insufficient to prove liability.²⁷

²⁰ *See id.*

²¹ *Greenwood v. Harris*, 362 P.2d 85, 88 (Okla. 1961).

²² *Senesac v. Assoc. in Obstetrics & Gynecology*, 449 A.2d 900, 903 (Vt. 1982).

²³ *Becton v. Starbucks Corp.*, 491 F. Supp. 2d 737, 741, 747 (S.D. Ohio 2007) (citing FED. R. EVID. 801(d)(2) on admissions of party opponents); *see also Wickoff v. James*, 324 P.2d 661 (Cal. App. Ct. 1958) (holding that the statement, "I sure made a mess of things" could ground juror's inference of negligence); *Woods v. Zeluff*, 158 P.3d 552 (Ut. App. Ct. 2007) (stating he "missed something" and "shouldn't have done" it admissible to prove negligence).

²⁴ *Fognani v. Young*, 115 P.3d 1268, 1270 (Colo. 2005).

²⁵ *Id.* at 1267-68.

²⁶ *See supra* notes 21-24.

²⁷ *See, e.g., Sutton v. Calhoun*, 593 F.2d 127 (10th Cir. 1979); *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972); *Phinney v. Vinson*, 605 A.2d 849 (Vt. 1992).

B. *Chilling Effect on Apologies*

Though hardly devastating to the apologizer's case, the tendency to admit apologies into evidence seems to deter the practice of apologizing. A survey of physicians revealed that the overwhelming majority want to apologize to patients whom they have harmed but refrain from doing so out of fear their contrition will be used against them in civil trials.²⁸ Their reluctance is supported by advice they receive from legal and ethical consultants who serve the hospitals that employ them and their insurers.²⁹ Physicians have long been encouraged not to apologize, so as to avoid contributing to incurring their own liability judgments.³⁰ The risk of adverse evidentiary use is apparently sufficient to advise, at the very least, caution in speaking to the victim of one's injury.³¹ One reason, at least in the medical context, is the fear that insurance companies will be less likely to extend coverage to clients who adversely affect their chances of prevailing in a lawsuit, even if only to the extent of contributing slightly to the available evidence against them.³² Apart from insurance coverage, the mere fact that an apology is usable as evidence seems to lead some legal advisors to discourage them on the grounds that contributing in any way to adverse litigation, such as giving a potential plaintiff any information that would be valuable in a lawsuit, encourages such lawsuits or fails to discourage them.³³ In addition, the context of choosing one's words to avoid lawsuits is in itself incompatible with the concessionary, open, self-deprecating mindset characteristic of the apologetic stance.³⁴ Once the possibility of evidence is considered, the apolo-

²⁸ Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1005 (2003).

²⁹ See, e.g., Marthadra J. Beckworth, *Admissibility of Statements of Condolence or Apology*, PLICO News (Physicians Liab. Ins. Co., Oklahoma City, Okla.), Fourth Quarter, 2006 (noting that there "is a fine line between an expression of condolence and an admission"), available at <http://www.plicook.com/sites/plico/uploads/images/4Q06%20newsletter.pdf>; Lola Butcher, *Lawyers Say 'Sorry' May Sink You in Court*, THE PHYSICIAN EXEC. 20–23 Mar./April 2006; see also Kevin Quinley, *'Sorry Works'—or Does It?* 25 MED. MAL. L. & STRATEGY 3 (Dec. 2007) (warning practitioners of the insurance coverage risks in "so-called apology programs").

³⁰ See, e.g., Anna C. Mastroianni et al., *The Flaws In State 'Apology' And 'Disclosure' Laws Dilute Their Intended Impact On Malpractice Suits*, 29 HEALTH AFF. 9 (Project HOPE, Bethesda, Md.) September, 2010 at 1611, 1612.

³¹ See, e.g., *supra* notes 28–30.

³² See, e.g., Kevin B. O'Reilly, "I'm Sorry": Why is That So Hard for Doctors to Say? AM. MED. NEWS, Feb. 1, 2010, available at <http://www.ama-assn.org/amednews/2010/02/01/prsa0201.htm> (quoting Steven I. Kern, senior partner at Kern Augustine Conroy & Schoppmann, specializing in physician clients: "If [the apology] becomes an admission that's usable in a malpractice case, it could affect the ability to defend the case").

³³ See, e.g., Joel S. Weissman et al., *Error Reporting and Disclosure Systems: Views from Hospital Leaders*, 293 JAMA 1359, 1359–66 (2005) (quoting a lawyer saying, "Why give the enemy even one tiny gram of TNT if I could give them none?").

³⁴ See, e.g., Gallagher et al., *supra* note 28.

getic context is constrained, if not corrupted. In sum, the available data suggests that admitting apologies into evidence at all discourages them to a degree that is disproportionate to their actual probative value.

C. *Apologies Prevent Long Legal Battles*

Yet just as there is reason to think evidentiary admissibility discourages apology, separate evidence suggests that apologizing would be legally advantageous if people could overcome their fear of playing into their opposing litigants' hands. Various studies suggest that apologies can prevent lawsuits from being filed altogether, and increase the likelihood and speed of settlement for those that do arise. For example, one British study found that many plaintiffs who sued their doctors said they would not have done so had they received an apology and an explanation for their injury.³⁵ The University of Michigan Health Service (UMHS) reported that its per case payments decreased by 47% and the settlement time dropped from twenty to six months since the introduction of the 2001 "Apology and Disclosure Program," which required that healthcare professionals apologize to patients who complained of being injured while under the UMHS care.³⁶ Similar, though slightly less dramatic, results were found at the University of Colorado Medical Center.³⁷ Furthermore, Jennifer Robbenholt surveyed a large number of participants asked to consider themselves in a set of hypothetical "simulated cases," varying only by whether an apology was offered and its type (remorseful, merely sympathetic, full or partial).³⁸ She found that an overwhelming majority (73%) were inclined to accept a settlement offer when a "full apology" was offered, as compared with only half the participants when there was no apology involved.³⁹

The empirical research is still at an early stage. It is small, and, except for the Michigan study and a handful of others, it relies heavily on reactions to hypothetical scenarios. It also does not shed much light on exactly what about an apology causes people to respond more positively to settlement offers and even to refrain from suing in the first place. But it does seem to suggest that apologies are mutually beneficial to injurer

³⁵ Francis H. Miller, *Medical Malpractice Litigation: Do the British Have a Better Remedy?*, 11 AM. J. L. & MED. 433, 434–35 (1986) (commenting on the much greater role of apology and significantly lower incidence of malpractice suits in England than in the U.S.); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 THE LANCET 1609, 1612 (1994) (reporting a British study that found 37% of families and patients bringing suit may not have done so had there been a full explanation and apology).

³⁶ See, e.g., Boothman, et al, *supra* note 1, at 125.

³⁷ See Jesson & Knapp, *supra* note 1.

³⁸ See Jennifer K. Robbenholt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003).

³⁹ *Id.* at 486.

and victim, inspiring victims to reconcile and sparing injurers the standard legal price of the harm they wrought. That, together with the moral benefits of apologizing, counts in favor of removing any evidentiary deterrent.

D. *The Apology Laws*

To that end, a growing number of states have sought to encourage apologies by explicitly denying their admissibility as evidence; the current wave of apology legislation, which has already swept through thirty-seven states and inspired similar versions in Canada and Australia, was reportedly set off in part by a single person's adverse experience.⁴⁰ Former Massachusetts state senator William L. Saltonstall prevailed upon his successor, Robert C. Buell, to draft the first state apology law in 1986. Some years after Saltonstall's daughter was killed in a car accident, the offending driver had never apologized or expressed regret.⁴¹ Senator Saltonstall discovered that the driver had said he wanted to apologize but "dared not," fearing that it would be used against him as tort evidence.⁴² It was this chilling effect of evidence law that the former state senator and his successor sought to reverse with the new legislation.⁴³

Indeed, the dozens of state "apology laws" passed in the last two decades were drafted in part to encourage apologies by expressly denying, in a highly publicized way, the admissibility of these apologies to prove liability.⁴⁴ Their motivation, in other words, is in part psychological: legislators meant the new measures to cause injurers to feel freer to apologize to their victims.⁴⁵ For that reason the statutes should not be read as necessarily adding substantively to existing evidence law. Some clearly do, protecting even factually incriminating apologies in certain

⁴⁰ Taft, *supra* note 5, at 1151.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ William K. Bartels, *The Stormy Seas Of Apologies: California Evidence Code Section 1160 Provides A Safe Harbor For Apologies Made After Accidents*, 28 W. ST. U.L. REV. 141, 143 (2001). Thus the new law was intended to stem lawsuits by encouraging apologies. The Massachusetts law was also apparently introduced to encourage apologies, though not necessarily with the primary aim of reducing lawsuits. See Taft, *supra* note 5, at 1151. Other states expressly include these sorts of motivations in their codification of apology laws. For example, both Georgia and South Carolina preface their laws with the following observation: "The General Assembly finds that conduct, statements, or activity constituting voluntary offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apology between or among parties or potential parties to a civil action should be encouraged and should not be considered an admission of liability." O.C.G.A. § 24-3-37.1 (2010); S.C. CODE ANN § 19-1-190 (2010).

⁴⁵ See, e.g., Taft, *supra* note 5, at 1151.

contexts, as we will see.⁴⁶ Many, however, deny admissibility only to statements that were arguably inadmissible already.⁴⁷ Even without the legislative protection, for example, a defendant could exclude certain apologetic statements, such as “I’m sorry you’re in pain,” by showing that the remark admits no point confirming or undermining a party’s position at trial, which would disqualify it as an “admission” under the exceptions to the hearsay rule. Alternatively, he might show that the prejudicial impact of admitting a statement, such as “I’m sick about what I did to you. It was horrible!,” substantially outweighs its probative value and therefore warrants exclusion under Rule 403 of the Federal Rules of Evidence and analogous state rules.⁴⁸ Many of the legislative measures arguably add nothing to these grounds for exclusion.⁴⁹ Recall, however, that Senator Saltonstall was moved by the reported belief, on the part of an injurious driver, that apologizing would incriminate him.⁵⁰ It was that widespread belief, or versions of it, that he and those who drafted the first “apology law” hoped to change, not necessarily the possible warrants for the belief. To that end, legislation that expressly protects apologetic remarks does more than restrict evidence at trial, if it does that at all. It loudly reassures would-be injurers, or at least their legal advisors, not to mention the general public, that apologizing need not expose them legally.

1. Laws Protecting Partial Apologies

Most of the apology laws do not go all the way to denying the admissibility of apologies, *per se*, as they preserve the admissibility of apologies that admit fault. Instead, they explicitly protect only “partial” apologies. A partial apology is one that excludes what are thought to be essential features of apologies, such as expressions of regret or remorse. For example, saying “I’m sorry about what happened to you” does not express the speaker’s regret over her own causal role in the event.

Of the laws that protect partial apologies, some specify outright that they deny protection to “admissions of fault,” while others simply describe the apologies they protect in such terms as to make clear they could not involve statements admitting fault.

Typical of the former group is Florida’s statute:

⁴⁶ See *infra* Part I.D.2.

⁴⁷ See, e.g., FLA. STAT. § 90.4026 (2010) (admitting apologies that simply express sympathy, benevolence or the like, even where such expression does not bolster or undermine any claim relevant to either party’s position at trial, and so would not qualify as “admissions” for purposes of exceptions to the hearsay rule); IOWA CODE § 622.31 (2010) (same). See also *infra* notes 51–52 and accompanying text.

⁴⁸ See, e.g., FED. R. EVID. 403.

⁴⁹ See *infra* Part I.D.2.

⁵⁰ See Taft, *supra* note 5, at 1151.

The portion of statements, writings, or benevolent gestures *expressing sympathy or a general sense of benevolence* relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be *inadmissible* as evidence in a civil action. A *statement of fault*, however, which is part of, or in addition to, any of the above *shall be admissible* pursuant to this section.⁵¹

Typical of the latter group is Iowa's exception:

In any civil action for professional negligence, personal injury, or wrongful death or in any arbitration proceeding for professional negligence, personal injury, or wrongful death against a person . . . that portion of a statement affirmation, gesture, or conduct *expressing sorrow, sympathy, commiseration, condolence, compassion, or a general sense of benevolence* that was made by the person to the plaintiff, relative of the plaintiff, or decision maker for the plaintiff that relates to the discomfort, pain, suffering, injury, or death of the plaintiff as a result of an alleged breach of the applicable standard of care is *inadmissible* as evidence.⁵²

Notice that on either formulation, an apology is protected as long as it amounts to an expression of good will, such as sympathy, benevolence or compassion toward the victim, implying nothing about the apologizer's role in the injury. This is reflected in the historical notes to the California statute, which is almost identical to Florida's, illustrating how to distinguish between protected and unprotected apologies.⁵³ A protected "expression of sympathy or benevolence" would be a driver's remark, addressed to someone whose car she rammed in an accident: "I'm sorry you were hurt" or "I'm sorry that your car was damaged." Under California's apology law (and those of most other states), these statements would be protected, inadmissible as evidence of liability. On the other hand, the statement, "I'm sorry you were hurt, the accident was all my fault," or "I'm sorry you were hurt, I was using my cell phone and just didn't see you coming," are partly admissible. The portions of the statements containing the apology ("I'm sorry you were hurt") would be inadmissible; any other expression acknowledging or implying fault ("I was using my cell phone" or "[it] was all my fault") would continue to be

⁵¹ FLA. STAT. § 90.4026 (2010) (emphasis added).

⁵² IOWA CODE § 622.31 (2010) (emphasis added).

⁵³ CAL. ASSEMBLY COMMON JUDICIARY, HISTORICAL NOTES TO CAL. EVID. CODE § 1160 (West Supp. 1995).

admissible, as the advisory notes put it, “consistent with present evidentiary standards.”⁵⁴

2. Laws Protecting Full Apologies

In contrast, some apology laws protect all apologies, provided they occur in certain contexts, and primarily that they be uttered by a health care professional to a patient.”⁵⁵ For example, Arizona’s statute provides:

In any civil action that is brought against a health care provider . . . any statement, affirmation, gesture or conduct *expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence* that was made by a health care provider or an employee of a health care provider to the patient, [or] a relative of the patient . . . and relates to the discomfort, pain, suffering, injury or death of the patient as the result of an unanticipated outcome of medical care is inadmissible as evidence of an admission of liability or as evidence of an admission against interest.⁵⁶

Other statutes in this category do not explicitly protect admissions of liability per se, but grant protection to admissions of fault,⁵⁷ or blanketly to any explanation of how an injury occurred, provided it is offered in good faith, even where the explanation amounts to an admission of an error.⁵⁸

As noted above, the “apology laws” that employ such broad protection are distinctly in the minority. The decisive majority protect only apologies that express nothing critical or incriminating about the apologizer.⁵⁹ In this they reflect two competing interests: encouraging apologies and preserving a plaintiff’s right to utilize probative evidence of liability. Consider, for example, a medical injury after which a doctor says “I’m so sorry I delegated part of the surgery to someone I now realize was not really up to the job.” Most state apology laws would offer no protection to such a statement, except perhaps not counting the

⁵⁴ *Id.*

⁵⁵ See, e.g., ARIZ. REV. STAT. § 12-2605 (2010); COLO. REV. STAT. ANN. § 13-25-135 (2010); CONN. GEN. STAT. ANN. § 52-184d (2005); O.C.G.A. § 24-3-37.1 (2010); S.C. CODE ANN. § 19-1-190 (2010) (nearly identical to Georgia’s).

⁵⁶ ARIZ. REV. STAT. ANN. § 12-2605 (2005) (emphasis added).

⁵⁷ See, e.g., CONN. GEN. STAT. ANN. § 52-184d (2010).

⁵⁸ See, e.g., VT. STAT. ANN. TIT. 12 § 1912 (2010) and the identically worded statutes of Georgia, GA. CODE ANN. § 24-3-37.1 (2010), and South Carolina, S.C. CODE ANN. § 19-1-190 (2010) (protecting expressions of “mistake” and “error” by healthcare providers).

⁵⁹ See *supra* Part I.D.1.

"sorry" as a further admission in its own right. One reason is that the doctor's remarks factually confirm behavior that could contribute to negligence, and there is scarcely better evidence of liability than expert admissions by the liable party. A doctor is considered an expert as to the standard of care and an authority on her own behavior. The state measures reflect an understandable interest in preserving such statements as proof of liability. Yet they also seem aimed at harnessing at least some of the apparent power of apologetic statements to heal grievances and resolve disputes. Admitting expressions of sympathy and benevolence, such as "I feel so sorry about what you suffered," for example, seems to serve this balance, inasmuch as it involves elements of apology ("I'm sorry"), but lacks anything that could constitute a probative admission of liability. The majority of states that passed apology laws appear, then, to have found a compromise between the two competing aims.

II. DO "FULL" APOLOGIES INCRIMINATE?

A. *"Real," or Self-Critical, Apologies are Still Admissible*

It is understandable that most states sought to avoid such broad protection of apologies as to exclude from evidence outright admissions of liability; less clear is whether, to serve this evidentiary end, they needed to restrict protection quite as much as they did. What prompts the question is that the "partial" nature of most apology laws comes at a considerable price: they protect only expressions and utterances that are entirely uncritical of having caused or allowed harm. One can utter a statement such as "I feel awful for you," without taking any negative view of what one did to harm or to fail to prevent harming someone else.

Apologies, however, seem essentially to express self-critical states. Psychologists identify several main components of apologies, such as admission of responsibility, expression of remorse, promise of forbearance, and offer to repair, and found that each one contributes to the apology's effectiveness.⁶⁰ Note that at least two of the four (admitting responsibility and expressing remorse) imply a self-critical view of the harm done. I did not include promise of forbearance, though it could be read to imply that what was done should not have been done, and that is why it will not happen again. And while one study apparently found that the "apology laws," as they stand today, have reduced legal conflict and enabled speedier settlement, the study examines all the state measures as a whole, lumping those that protect full apologies (10 states), including self-critical and outright inculpatory ones, with the statutes under consid-

⁶⁰ Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTICS 127, 132 (1997).

eration here.⁶¹ Moreover, the most recent study that *does* consider the effects of different types of apologies on legal conflict found that the type of apology matters considerably, particularly whether it involves self-criticism. Jennifer Robbenholt's study simulating apologies and settlement offers found that partial apologies, including "I am so sorry that you were hurt. I really hope that you feel better soon," were substantially less likely to elicit agreement to settle than full apologies, such as "I am so sorry that you were hurt. The accident was all my fault. I was going too fast and not watching where I was going until it was too late."⁶² In fact, they encouraged fewer settlements, with a larger "unsure" group, than offering no apologies at all.⁶³ The implication appears to be that expressing self-criticism helps make an apology more effective in resolving conflict.

Self-critical apologies, in other words, have value. Still, the laws are tailored to reflect a competing value, as well. As noted earlier, a victim has a strong interest in the incriminating admissions of her injurer, including when they accompany or come embedded in an apology. A doctor who tells her patient "I'm sorry I didn't prescribe a more effective dosage" may have provided the only reliable evidence of her liability, evidence on which the patient may depend for livelihood and compensation for an injury that incapacitated him. And, as Lee Taft has argued, excluding such evidence also has threatening implications for the value and integrity of apologies as a practice.⁶⁴ If an apology may involve admissions of fault and liability and nevertheless remain shielded from the trial process, the apologizer seems insincere, admitting responsibility in one context and, seemingly, denying it in another. That is not to say the inference of insincerity is justified. Many apologizers may be in no position to compensate their victims and, in any event, they may legitimately expect that the liability likely to be imposed on them following litigation would be excessive. They may, in other words, admit and be willing to take moral responsibility but not necessarily the extent of legal responsibility they expect to be assigned. Thus they may seek to fulfill their moral duty to apologize but have good reasons to resist legal liability. Still, full protection would enable injurers to take what seem like contradictory positions toward their victims. In short, there are well-settled reasons not to protect apologies that admit or imply liability.

⁶¹ Benjamin Ho & Elaine Liu, Does Sorry Work? The Impact of Apology Laws on Medical Malpractice (Oct. 2010) (working paper), available at <http://forum.johnson.cornell.edu/faculty/ho/Ho-Liu-Apologies-and-Malpractice-nov15.pdf> (exploring the relationship between the passing of apology laws and time to settlement using two different methodological techniques (survival analysis and difference-in-difference)).

⁶² Robbenholt, *supra* note 38, at 484 n.112.

⁶³ *Id.* at 484–86.

⁶⁴ Taft, *supra* note 5, at 1151.

These sorts of considerations would seem to advise in favor of admitting self-critical apologies, including such expressions as "I should have acted differently," or "I made a horrible mess of things" *if* such expressions count as admissions of liability. That is, if a speaker's remorseful, regretful or otherwise self-critical statements admitted or implied that she was negligent, and therefore liable, they arguably should be admitted into evidence. As it happens, current legal practice and most of the new apology laws *do* construe them as such. Specifically, courts tend to treat self-critical apologies, such as "I'm sorry I messed up," as admissions of negligence, or at least as expressions that, in some way, contradict or undermine the party's denial of negligence.⁶⁵ I now turn to the reasons why I take this to be a misreading of these sorts of expressions.

B. *Self-Criticism is Not Incriminating*

The core of my argument against construing self-critical apologies as legally incriminating lies in showing that all injurers, even those with no legal or moral culpability, have reason to be self-critical about the harms they caused. Even purely non-culpable injurers have reason to take the stance expressed by remarks such as "I really messed up," or "I did something horrible." That is because harming others, even blamelessly, constitutes a misuse or misfire of one's considerable efforts to avoid doing so, efforts in whose success moral agents are deeply invested. When they harm someone, then, they appropriately regard their injurious conduct with criticism, if not guilt or blame.

This thesis is controversial in certain quarters,⁶⁶ but I want to be clear about what specifically it asserts and denies before defending it. First, the claim is that people have reason to be self-critical of the harms they blamelessly caused. It is not claimed, however, that they must be self-critical, nor does the thesis specify the nature of the self-criticism,

⁶⁵ See McCORMICK, *supra* note 19.

⁶⁶ Some claim that moral judgments are appropriately applied only to the will and its selection of maxims, reasons, or motives for action. Thomas Nagel calls this constraint Kantian. See THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24 (1979). Not everyone interprets Kant this way, however. Julie Tannenbaum proposes an original account of morally grounded agent regret for harming others. Tannenbaum's account draws on another part of Kant's moral theory: moral agents should value and work to preserve rational agency, on her account, in light of the Kantian principle of treating humanity as an end in itself and the (Kantian) value of rational will. For that reason, they should disvalue actions that fail to realize the end of promoting and protecting rational agency. Julie Tannenbaum, *Emotional Expressions of Moral Value*, 132 PHIL. STUDIES 43, 53–54 (2007). My own account, in contrast, derives the self-critical stance about past harms from the moral practices that must be undertaken on pain of negligence. I also deny that the self-critical stance involves an evaluative judgment of one's actions; indeed, one must judge one's actions above reproach if they violate no moral wrongs, or so I want to allow.

specifically whether it involves feeling guilty or responsible. In fact, it will be compatible with what follows that morally blameless injurers have no reason to feel responsible for the harms they caused, nor to feel “guilty,” if that implies self-blame.

Second, the thesis cuts across the legal-moral divide in assessing injurious behavior. That is not to make light of the well-known differences between legal and moral culpability.⁶⁷ Negligence, for example, means different, though related, things to law and morality. Legal negligence, roughly, involves behavior that can reasonably be expected to cause harm, whatever the actual expectations or intentions of the agent involved. One can, however, be morally blameless while being, at the same time, incorrigibly inept at living up to the objective standards set by tort law against negligence.⁶⁸ The difference, in other words, has considerable application. But little of what follows here turns on it, because the thesis is that harming someone in *any* way, including legally and morally innocent ways, merits a self-critical stance. For that reason, expressing self-criticism, such as “I messed up horribly,” does not imply legal *or* moral culpability any more than it implies innocence, and therefore should not be admissible under the “admission by party-opponent” exception to hearsay.

Finally, the thesis is independent of the duty to apologize. It is an important question, one I take up in Part IV, whether truly blameless injurers have any moral reason to apologize to their victims. If, as I hope to show, they do, then that constitutes further grounds to read these speech acts as nonincriminating, at least to the extent that apologies require self-criticism. But what I am arguing here is broader, and applies even to self-critical statements that are not apologies for purposes of moral repair; namely, self-criticism is an appropriate way to assess having harmed someone else, even blamelessly. For that reason *expressing* self-criticism, including to the victim, does not imply that one takes oneself to be legally or morally culpable in the harm done, despite the prevailing legal reading to the contrary. Expressing such assessments as “I did a terrible thing,” or “I screwed up,” including as part of an apology, merely gives voice to a self-critical stance that is entirely appropriate after harming another person faultlessly. I now turn to the discussion of why that is so.

Bernard Williams is perhaps the most prominent of recent philosophers to state outright that it is morally appropriate and rational to react

⁶⁷ See John Gardner, *Obligations and Outcomes in the Law of Torts*, RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORE 111, 121 (Peter Cane & John Gardner, eds., 2001).

⁶⁸ *Id.*

badly to blamelessly harming another person.⁶⁹ Williams illustrates the familiar phenomenon with the example of a truck driver, who blamelessly runs over a child who had quickly crawled into the street, hidden from view.⁷⁰ Although everyone on the scene, including the handful of spectators gathered at the roadside, properly regards the fatal accident as tragic and horrible, the driver alone feels what Williams calls "agent regret."⁷¹ He feels a special sort of negative reaction on account of being the one who inflicted the damage, even if he did so blamelessly.⁷² And, Williams suggests, he *should* react that way.⁷³

Williams's notion of "agent regret," however, need not involve any critical assessment. While it may seem natural to feel bad about harming others, as Williams observes,⁷⁴ it is less clear that one should view oneself negatively for doing so. Indeed, strong intuitive considerations run in the opposite direction. If I have no basis to criticize the truck driver's innocent infliction of harm, then for exactly the same reason he has no basis to criticize himself. After all, perspective aside, we have exactly the same grounds for evaluating the incident. Criticism, indeed, implies a judgment or an evaluation, and it is not clear what negative judgment could overcome the fact that the injury was blameless, especially when that is clear to everyone besides the injurer.

That is not to say the agent regret should be taken lightly. Presumably the driver shares the bystanders' revulsion at what happened. But unlike them, he has the added cost of being a central player in it. Not only does he know that *someone accidentally killed the child*, but he has the further awareness that: *I was that "someone."* While this further thought perhaps adds nothing to the evaluation and assessment of the players in the story, it cannot be experienced neutrally. One reason is that from that moment on, his life story, unlike theirs, is indelibly tarred by a contribution to a tragic event. In addition, he presumably abhors these kinds of tragedies, recoiling in horror when he hears about them. He disvalues them, as they make the world worse. As Herbert Morris points out, people want no role in damaging what they value or creating what they disvalue.⁷⁵ For these sorts of reasons, perhaps, the driver regrets what he's caused, beyond the feeling of sympathy and revulsion he shares with the bystanders. Importantly, though, these forms of regret,

⁶⁹ See BERNARD WILLIAMS, *Moral Luck*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980* 20, 27-29 (1981).

⁷⁰ *Id.* at 28.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 29.

⁷⁴ *Id.*

⁷⁵ Herbert Morris, *Nonmoral Guilt*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS* 220, 226 (Ferdinand Schoeman ed., 1987).

though unique to the perpetrator of the harm, remain compatible with holding oneself entirely above reproach.

Indeed, the philosophical responses to Williams's essay generally do not treat agent regret as grounding or following from self-criticism, at least not in the case of truly blameless injurers like the driver. Thomas Nagel, for example, says of the driver: "if he is entirely without fault, [he] will feel terrible about his role in the event, but will not have to reproach himself."⁷⁶ Similarly, Harry Frankfurt describes the appropriate response to faultlessly harming others as a version of agent regret that falls short of self-criticism.⁷⁷ Since the driver should not be held *morally* responsible for what he did, on the grounds that there is no objective basis for criticizing his intent or conduct, Frankfurt finds no basis for him to feel guilty or morally self-critical about the death he caused.⁷⁸ Instead, Frankfurt argues, he would naturally feel something closer to embarrassment over his connection to something awful.⁷⁹ Frankfurt compares this state of mind to someone afflicted with a horrible disease who, through no fault of his own, infects a large population.⁸⁰ He could be quite "horrificed" and embarrassed in a "deeply shattering" way at what turned out to be the inadvertent products of his own body's operations. But Frankfurt draws a sharp line between this negative reaction and guilt or moral criticism: the diseased man has no basis to negatively assess himself morally.⁸¹ Nothing he did is worthy of criticism.⁸²

For present purposes, what is worth scrutinizing in these views is their shared reliance on a key assumption, namely that moral self-criticism is appropriate only upon finding oneself culpable, in fact. Against this view, I propose that there are, rather, multiple kinds of moral self-criticism, at least one of which does not involve blaming oneself or taking oneself to be guilty or culpable. Yet such a critical reaction remains, unlike embarrassment or shame (as in Frankfurt's account), uniquely moral. Put differently, one can appropriately *feel* guilty, or take a morally self-critical view of one's past behavior, without *finding* oneself guilty. The rest of this Part will be devoted to constructing what this sort of self-assessment might be, and why it is appropriate whenever one harms other people. Its appropriateness, in turn, shows that apologizing self-critically for harming another person does not imply culpability, moral or legal, in the event. To read moral self-criticism as implying any

⁷⁶ NAGEL, *supra* note 66, at 28–29.

⁷⁷ Harry Frankfurt, *Inadvertence and Moral Responsibility*, THE AMHERST LECTURE IN PHILOSOPHY 1, 10 (2008), available at <http://www.amherstlecture.org/frankfurt2008>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 13.

⁸¹ *Id.*

⁸² *Id.*

kind of fault is, then, a mistake, a mistake which dominates current legal practice and the new reforms.

The discussion proceeds in two steps. First, I will argue that moral agents are already deeply invested in not harming other people and direct their actions accordingly. Second, I will argue that this use of effort, together with the investment it serves, grounds a negative view about their *past* inflictions of harm, including blameless harms. This view of one's past harmful behavior, though it does not involve self-blame, amounts to a morally self-critical stance. It is, moreover, this self-critical stance that apologies for blameless harms can meaningfully express or imply.

1. Moral Agents are Deeply Invested in Not Harming Others

The first step begins with an observation: moral agents go to considerable lengths to avoid harming others. All but the negligent or malicious engage in an elaborate set of behaviors designed to ward off the possibility of causing injury, which become more intense and urgent as that possibility grows likelier, or the injury more severe. They drive safely, watch where they walk, take precautions when operating hazardous machinery and sanitize the objects they share with others. And, perhaps more importantly, as soon as an activity they thought was safe appears likely to cause harm after all (for example, driving just above the speed limit on an abandoned road when suddenly a pedestrian crosses) they immediately change course to stave off the danger, with extreme effort.

These steps reflect a serious investment in not harming other people, which intensifies with either the degree or likelihood of harm. True, the investment could be higher still. Imagine never driving cars or taking a single step without canvassing the environment for danger. That would amount to more than a serious investment in avoiding harm; it would be an absolute investment, crowding out others. Instead, moral agents are merely seriously invested in not injuring other people, among many other ends and investments. In fact, moral agents taking reasonable care seem, at times, to stop even considering whether they pose danger to others; once they are reassured of the safety of an activity like sitting on a park bench, for example, they may take the liberty of discounting altogether the risks they might impose. They may recline thoughtlessly on the bench, perhaps losing themselves in a book or the scent of fresh grass. That is, perhaps, until they notice that the bench leg is perched on someone's foot, at which point they are required to change their behavior immediately. In other words, their investment in avoiding harm tracks the likelihood of a particular activity causing it; if harm is unlikely, even the non-negligent may discard it. They need not act as though preventing

injury is worth the all-consuming cost of remaining vigilant even during reasonably safe, everyday activities. But that still amounts to a fairly serious investment in not harming others, one that is triggered by the first signs of danger in an otherwise safe activity.

Some argue that this investment requires an active psychological state. John Gardner, for example, points out that moral negligence, like its legal counterpart, is identified as a failure to take “due care” in order not to harm others.⁸³ An essential feature of such due care, he argues, is actually caring, in the sense of forming and maintaining an occurrent intention not to cause harm.⁸⁴ Moral agents, on this view, are, on pain of negligence, actively intending not to harm others (as connoted by the phrase “taking care”). My claim here is weaker: moral agents may desist from the effort to avoid injuring others—indeed, it may play no role in their occurrent psychology for long stretches—just as long as they have no reason to regard their activities as dangerous. But the effort remains as a kind of background disposition, triggered as soon as the likelihood of harm presents itself. On either view, then, moral agents have a serious investment in preventing themselves from injuring others.

2. Investment Against Harm Grounds Self-Criticism

It follows from the foregoing that, in practice, a moral agent who is non-negligent is often either (a) actively taking steps to avoid harming others; or (b) not taking steps to avoid harming others on the belief that there is little or no danger of doing so. Thus when moral agents inadvertently do inflict harm, in the end, they have done something they are deeply and actively invested in not doing. As with any human investment of resources, failure to secure the intended result is experienced more painfully the greater the investment. A physician dedicated to saving an accident victim’s life, as well as the victim’s guardian or partner, may experience her death more painfully than a stranger who happened by, even if everyone acted above reproach to try to save her. That said, even a moral agent with no special interest in the wellbeing of some stranger, whom she blamelessly harms, has caused a result she was actively involved in attempting to prevent.

This tension between one’s actual impact on the world and the way one is deeply, actively invested in impacting the world is experienced self-critically. One simply cannot maintain the investment without being self-critically oriented towards its failure. Consider other investments: suppose one is deeply involved in building a house. She cannot but take a negative stance toward her own toppling or inadvertent destruction of

⁸³ See Gardner, *supra* note 67, at 120–121.

⁸⁴ *Id.* at 120 (“Taking care is an essentially intentional action. One cannot take care not to Ö without trying not to Ö”).

the home, at least while she is actively pursuing the project of building it. That is part of being deeply involved in the project. The same holds for mundane tasks like cleaning a room; the more invested one is in keeping it clean, the more self-critical a stance one takes on causing it to be tarnished, even inadvertently. The tarnish is experienced as a tension between what one actually did and what one was deeply invested in doing. And this tension is experienced self-critically.

Few know this phenomenon better than those engaged in fiercely competitive games. To be actively invested in winning a basketball game is to be negatively oriented towards missing a shot or losing the ball to the other side, no matter what caused it. To be deeply invested in bowling is to feel the anguish of a gutterball right through the moment it veers inevitably off course. The difference between games and the moral investment in not harming others is that one can leave the court, and the investment, once failure sets in. One can go in and out of an athletic investment, and it is helpful to drop it when failure is experienced too painfully or distractingly. The investment in not harming others, however, never leaves a moral agent. And it therefore grounds a constant self-critical stance towards one's actually causing injury to another, even non-negligently. (A negligent moral agent has a more severe basis for self-criticism). For example, Williams's truck driver, if he were taking reasonable care to drive safely, chose his speed, along with the amount of times he glanced at the road and at parked cars, so as to avoid harming anyone. Whether or not he was experiencing it intensely at the time, he was actively involved in his ongoing project of avoiding harm to others, one in which he was deeply invested. It turned out, moreover, that in pursuit of this investment he chose poorly (if blamelessly); he miscalculated how carefully he needed to drive to prevent danger. While it was an innocent miscalculation, it was also a misuse of his driving efforts, inasmuch as he meant them to effect a certain result (not harming or killing someone), one in which, as a non-negligent moral agent, he was deeply invested. The mismatch between that result and his investment grounds a self-critical stance, one he experiences painfully, even if he does not consider himself at fault.

The same sort of stance would be directed at less violent actions than killing a child inadvertently. Suppose one calls an old acquaintance, after not seeing her for ten years, by the name of her late and recently deceased sibling. The remark sparks sadness and discomfort, and perhaps vicarious embarrassment for the speaker. But it was done blamelessly; the speaker had uncontrollably confused the two names in his memory, they looked alike, and someone in the room had yelled out the sibling's name in her general direction. It was a reasonable mistake, and would count as blameless. Still, long after the speaker has any contact or

interaction with the acquaintance, he likely regrets what he did, bemoaning the misuse of his memory and speech. He took no extra steps to get her name right, and that led to a result he was invested in avoiding, namely saddening and embarrassing his acquaintance. Again, his view of this misfire of speech and memory is self-critical; he is profoundly displeased with his use of his own faculties, which did not achieve the result he was aiming them to achieve in light of his deep investments. But he does not regard blame as appropriate, nor does he assign himself guilt in the episode. He is, however, self-critical.

Notice also that this self-criticism is different from merely judging that one's actions effected a disvalued result, and so are disvalued derivatively. Rather, those actions themselves were, so to speak, misfires; they were themselves aimed at safety, and chosen in all their particulars on the mistaken belief that they would be safe. As a result, a moral agent would be displeased with herself for each aspect of the action that led it away from where it was directed. In basketball, for example, a player deeply invested in scoring will not merely disvalue a missed shot as an action that had the wrong result. She will further lament the force with which she propelled the ball (too far), the arc with which she pushed it (too high), the direction she aimed it (just off center), and every other aspect of her actions that she was directing at the result of scoring. Her displeasure with herself is directly bound up in the way she was directing her efforts, not merely in what result she valued. Unlike with basketball, however, the moral agent does not have the luxury of being able to disassociate herself from the investment in the desired result once she fails to achieve it. As already noted, she's never on the sidelines.⁸⁵ So the failure to avoid harming others is experienced self-critically, as in tension with one's deep investments, as the very action one's ongoing efforts treat strenuously as not-to-be-done.

That is why one has reason to be self-critical when one harms another, even blamelessly. Efforts were used to a highly disvalued effect, one whose disvalue is experienced negatively by moral agents.⁸⁶ Moreover, since the aim of these efforts, not harming another person, is moral, the self-critical orientation toward their failure is uniquely moral. It is therefore both sensible and appropriate to take a self-critical stance toward one's blameless infliction of harm. It is for the same reason appropriate to say about such efforts, "I should not have done that," or "I was supposed to do it differently," or "I messed up," or even "I failed." That

⁸⁵ See, e.g., BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 102 (1993).

⁸⁶ This characterization may invite an obvious counterexample: the case of *justified harms*, in which the efforts succeeded, and are above reproach *even in hindsight* (such as an operation that caused a minor injury to save a life). In these cases, even if apologies are due, I find it less clear that they would appropriately be self-critical.

is why an apology that expresses or implies such a self-critical stance does not warrant the inference that the speaker takes herself to be culpable or liable. Her words merely express a stance moral agents would likely take given the investments they naturally acquire, and the efforts they naturally make, as part of taking due care not to harm others.

III. OBJECTIONS

A. *Ought Implies Can and Substantive Virtue Theory*

The argument in the prior section began with the supposedly natural fact that non-negligent moral agents are deeply invested in not harming others.⁸⁷ This claim was used to impute to the same moral agents a self-critical view of their past harmful behavior, namely as failures or misuses of efforts to achieve a result in which they were deeply invested (or misuses of a temporary suspension of effort toward that end). They drove just a bit too fast, or failed to double check something that turned out to be pivotal, or misremembered something, or spoke too soon. All of those missteps were blameless, perhaps, but they led to a failure to achieve a very important, valued result.

There are, however, familiar philosophical positions that might be seen as challenging this picture of moral agents. One is the view, sometimes attributed to Kant, that acts of will, rather than their consequences, are the proper object of moral concern.⁸⁸ Therefore a moral agent need not have any investment one way or the other in whether she actually causes harm, but only in whether she did her best to avoid it. Thus she may be very concerned to take reasonable care, in the sense of not being negligent. And in practice, this may require taking all sorts of steps meant to prevent foreseeable harms. But she may, at the same time, have no special investment in whether these steps succeed; her purpose is merely to have fulfilled her duty to take them.

This legalistic moral agent may be comparable to an obedient citizen of a state that bans negligently dirtying the sidewalks. One must take all sorts of measures to avoid causing the sidewalks to become dirty, within reasonable standards. The law-abiding citizen might believe in the legitimacy of state law and the duty to follow it, but have no special investment in clean sidewalks per se. Still she takes all the crucial steps: she cleans her shoes before walking, glances back along her walking path, makes reasonably sure not to spill, and stops herself when she sees she is about to smudge the walkway after all. Although she remains

⁸⁷ See *supra* Part II.B.1.

⁸⁸ See NAGEL, *supra* note 66, at 24 (arguing that cases like Williams's, in which regret is grounded in the result of someone's actions, do not fit Kant's moral theory, which limits the reach of moral judgments to such results-blind factors as the will and its choice of maxims); but see Tannenbaum, *supra* note 66, at 53–54.

uninvested in whether these efforts work, as she's not actually a fan of clean sidewalks and happened to vote against the referendum that put the requirement in place, she is law-abiding and believes in following the law. Perhaps, one might argue, moral agents can be this way, too: they do what they can so as to avoid negligence, but need not be invested in the results of their best efforts.

While this stance may be coherent, there is reason to doubt that moral agents can actually maintain it in practice. True, there may be no *duty* not to harm people, and arguably no duty to be invested in not harming people; the only moral duties, perhaps, concern actions reasonably directed against causing harm. But being invested in not harming people may be essential to *success* at fulfilling the narrower duty of taking reasonable care, or of not being negligent. Adapting the methodology that Seana Shiffrin calls "substantive virtue theory,"⁸⁹ one can ask what it is that agents committed to a principle against negligently harming others should do, in order to realize and abide by the principle reliably. There will be other activities, goals and dispositions that they will take up and cultivate, whose importance is implied, if not outright mandated, by the principle itself. These are the "virtues" that people properly committed to a principle, or who are capable of reliably following it, will tend to manifest. For example, people who follow the principle of respecting the religions of others will likely do more than merely refrain from disparaging or grudgingly tolerating exotic rituals. They will need to try to appreciate these practices, even seeking to discover at least some value in them. This takes effort, but without it they are likely to become bored or impatient with bizarre practices to which they cannot at all relate. True, such self-sensitization is hardly required, explicitly, by a directive to respect the religions of others. But it is what people who accept or want to reliably follow the principle will, in all likelihood, have to do to succeed at it.

Similarly, in the case of fulfilling the duty against negligent harm, one cannot hope to succeed simply by taking the necessary steps, all of which are aimed at the result of not causing harm, without being invested in the result. One reason for this emerges in the differences between moral negligence and nonmoral legal duties, such as the "clean sidewalk law" discussed above. The duty to take reasonable care, or to avoid negligence, can be described in deceptively moderate terms: "reasonable," "ordinary care," "due care," etc. In fact, however, it involves a fairly vigorous and ongoing project of avoiding harms. This becomes evident as soon as one is confronted with a foreseeable and possibly avoidable harm: a doctor, for example, finds that after she took all the necessary

⁸⁹ Seana Valentine Shiffrin, *Incentives, Motives and Talents*, 38 PHIL. PUB. AFF. 112, 113–16 (2010).

measures to keep her patient safe during routine surgery, her patient is nevertheless suffering on the operating table and in grave danger. At that moment, the effort the doctor is required to take is strenuous and serious; on pain of negligence, she must urgently try to save the patient and prevent him from suffering serious harm or damage. The same holds for a safe driver whose brakes falter as he careens toward a parked car; he will be expected to slam on the brakes and spend all his energy trying to stop or detour the vehicle up to the moment before contact. Anything less would be considered monstrous. Even here, it is possible to separate the effort from investment in the result. But the extent of effort that morally required care imposes in emergency situations, on pain of negligence, seems unmanageable without a deep investment in not harming people. The same is not true of instances in which one suddenly stands to break the law; even as the breach draws near, one is not compelled to take urgent efforts to prevent it.

These efforts, moreover, do not end once a particular harm is inflicted. A moral agent's goal is, after all, to avoid harms that she might have prevented, and that end remains in place even after she failed to achieve it in one particular episode. As a result, the failure figures into her new calculations of what can cause harm and, therefore, what can be prevented, and what is not to be done. Our success at achieving our moral ends is, in other words, an ongoing project, one which involves improving our effectiveness once we detect flaws in our past efforts.⁹⁰ When we fail, those same ends require that we adjust our practices to become better at fulfilling them in the future. With negligent harm, then, we start by trying to avoid all harms, and then figure the previously unavoidable injury into our new calculations; that sort of event, now within the realm of imaginable (and so more avoidable), is what we now aim to prevent next time. So it was something that we both (a) previously expended effort to prevent, or suspended the effort on the belief it would not happen; and (b) now must view as requiring more extensive effort to avoid.

Once we harm someone inadvertently, then, we take the self-critical view that we did something we remain, even now, deeply invested in not doing. Our apologies, then, would naturally reflect this self-critical stance. For that reason, such apologies should not be treated as even *prima facie* evidence of fault or liability.

⁹⁰ See HERMAN, *supra* note 85, at 102 (explaining how a moral agent who adopts the Kantian constraint that only culpably willed actions can be wrong might nevertheless have a duty to engage in moral repair after accidental harm).

B. Too High a Moral Standard?

The picture of moral agency suggested by my account of blameless self-criticism may seem implausible in several ways. First, it may seem unrecognizably saintly or severe. That is in part, perhaps, because of the seemingly constant nature of the project of avoiding harm as I have presented it, involving an ongoing effort in which moral agents are deeply invested. But “ongoing effort” and “deeply invested” are in fact rather open concepts. Parents, for example, could be aptly described as deeply invested in their children’s dental health (besides financially). This means both that they will try not to damage their child’s teeth, making sure that their day-to-day activities are not harmful to their child’s enamels, for example, and that they will immediately stop themselves when they realize they are about to inflict dental damage. One can correctly describe this disposition as an “ongoing effort,” inasmuch as *every* activity of the parent is intended, *inter alia*, not to inflict such damage, and *every* activity that appears likely to cause such damage will be stopped, once detected. But notice that such an approach hardly impacts most of the parent’s day-to-day life. Most of his activities will bear no trace of this investment, or the efforts in support of it, even as, all the while, the parent stands ready to cease or avoid any impingement on the child’s teeth, should the prospect come up. That is because very few activities need be done differently as a result of the effort or investment. Similarly, many human activities bear no risk of causing meaningful harm to another person. And as I mentioned, a moral agent’s investment in not harming others is but one of a perhaps infinitely many investments she may have. Thus many daily activities will barely implicate it. Still, every activity that moral agents perform is meant, among other things, not to be dangerous. It just usually takes little effort, in practice, to keep one’s behavior safe. Moral agents, in other words, engage in this constant effort, remaining deeply invested in its success, without being noticeably affected by doing so.

Another worry is that self-criticism of blameless harms implies perfectionism. Criticism of a failure to avoid harm seems to implicate a standard that insists on success even at the impossible task of preventing the unforeseeable or unavoidable. That, however, overstates the nature of the self-criticism described here. It is not an intolerance of failure. The self-criticism implied here amounts to nothing more than the stance that one did something that one was, in some way, trying hard not to do (or mistakenly not trying hard enough not to do), or that one meant one’s efforts to avoid doing for reasons in which one was deeply invested. It is accompanied by no moral judgment, nor does it involve acceptance of blame, punishment or even the victim’s resentment. It is compatible with rejecting, outright, all of those responses.

Moreover, this self-critical assessment may be felt rather mildly. Consider calling a friend at 9:30 p.m., only to discover, surprisingly, that the latter was just then getting ready for bed. The unpleasant interruption of the phone call would constitute a minor harm. And it would be fair to say the caller was trying *not* to harm her friend, not even by pushing back his bedtime a few minutes. At any rate, she at least meant the particular activity of placing a call, like all her daily activities, to be harmless to others, and would have adjusted her behavior had she any reason to believe otherwise. Once she inflicted the “harm” of the phone call, she would assess this activity as having failed to accomplish one of the things she meant it to accomplish, namely *not* harming anyone, and she would have acted differently, such as calling earlier, had she known more. This assessment of her action is plainly self-critical. But in this case the self-critical stance is experienced rather mildly, in light of the mild nature of the harm. As noted in the previous section, the investment moral agents have in not harming others varies with the severity of the harm, which in this case is rather miniscule. And the self-critical assessment here accompanies no negative moral judgment; how, after all, could she be morally expected to know her friend would head to bed so early?

Yet the caller's assessment, mild as it is, is different from *mere* agent regret. It is not simply a wish that the harm had not taken place or that she not be the one who inflicted it. Nor is she merely ashamed or embarrassed about it as though the phone call simply emanated from her like a contagious virus. She, like other moral agents, will also regard *the particular things she did* to cause harm—dialing the number at a certain time, putting it off beforehand, letting it ring three times—negatively, as having poorly executed one of her intended ends of not causing harm to others. The activity, or the cluster of associated activities that culminated in the call, were carried out so as to be harmless; and yet, that effort surely misfired. The call should have been made earlier, allowing only one ring, or not at all. She could have acted differently in countless ways. If the call had ruined a cat nap her friend was taking so as to be able to work an emergency night shift at a hospital, handling life-and-death cases on little sleep, her self-criticism might be more severe, because the misfire of her efforts to avoid harm was greater.

The intensity of the self-critical stance varies enormously, in other words, with the harm one blamelessly causes. But the self-criticism will never be much more than the tension between one's efforts to avoid a certain result—in whose success one was seriously invested—and the misfire of those efforts in fact. How intensely and painfully that tension will be felt depends on what, in fact, resulted from one's efforts and how invested the agent was in preventing that particular outcome. Even at its

most severe, this sort of self-critical stance will be different in kind from guilt or self-blame.

C. *Third Parties*

Still, the reasons to view one's own behavior self-critically, even if it is blameless, run up against a powerful observation Williams raises in discussing agent regret. Third parties, even with access to all the same facts, should react very differently to an injury they witness from those who blamelessly inflict it, like the truck driver who unavoidably killed a child beyond his view. Unless the third parties are judgmental they will not criticize him, and they will even try to console him and dissuade him of his negative reaction. And, as Julie Tannenbaum points out, these third-party stances are appropriate.⁹¹ It is perfectly in order, in other words, to take a noncritical view of faultless injurers and to console them, especially if they are racked with guilt. How, then, can this third-party stance be reconciled with the self-critical stance that, on the argument just presented, moral agents should take when they blamelessly inflict harm?

One way to reconcile the two standpoints is to show that they are perspectival. The moral agent's reasons to be self-critical stem from his own investment in not harming others, and the assessment that *his* efforts misfired in light of what *he* was directing them to do, and in which he was deeply invested. The third parties, in contrast, are not especially invested in *his* not harming others or in *his* proper use of efforts, and they certainly weren't directing his efforts so as not to result in harm. They do agree with the injurer that driving his truck over a child, however blamelessly, constituted a misfire of his actions in light of his deepest investment. But their assessment becomes critical only if they *endorse* or *share* the investment he has in *his* actions not causing harm, and nothing has yet been said to suggest that the third parties should do so. It is not surprising, therefore, that the driver should remain critical of his actions even while third parties should not, both with justification.

More surprising, perhaps, is that the third parties seem right in challenging the injurer's agent regret. If, as was just argued, the moral agent is right, at least from his own standpoint, to criticize his actions as misfired or misdirected, then there should be no basis to dissuade him from feeling guilty or at least deeply regretful. However, as with their uncritical view of him, the consolation of third parties is compatible with the injurer's self-criticism. Indeed, they have different objects. His self-critical reaction focuses on his realization that he misused or misjudged his efforts to achieve something in which he was deeply invested. The con-

⁹¹ See Tannenbaum, *supra* note 66, at 56–57.

soler, for her part, does not disagree with this stance, nor does she try to dissuade the injurer of it. Her target is, rather, the pain and suffering the injurer feels as a result of taking this appropriate stance. And the stance is not, strictly speaking, identified with this feeling: indeed, as a stance on a moral position, it does not have a particular feel or emotional content. There is nothing in particular that it feels like to regard oneself as having misdirected one's efforts to achieve an object of deep personal investment.

Moreover, it is properly regarded as unfortunate that the injurer must suffer pain and anguish as a result of a stance he finds himself taking due, in large part, to events beyond his control. That does not mean he should take a different stance. It only means that it is right to want the *experience* of that stance to be less painful for him. As a result, consolers seek to alleviate that suffering, by focusing his attention on his innocence in the affair. What they may not appropriately say is, "you did something fine," or "morally, you should be totally indifferent about the action you took." Instead, their consolation is not aimed at the injurer's appropriate moral self-criticism; it is, rather, aimed at his pain, by focusing his attention on the *limits* of the criticism to which he should subject himself. In particular, that criticism should fall short of blame. They rightly remind him of those limits as a way to alleviate his suffering over what he did, even while this reminder, and the attempt to make him feel better, remain compatible with the morally self-critical stance he should take.

IV. THE WAY FORWARD

A. *Apology as Non-Speech Evidence*

So far, this Article has evaluated the meanings and implications of apologetic expressions, in light of the legal practice of construing them as statements admitting some point undermining a party's case.⁹² I have tried to show that apologetic expressions, even fully apologetic statements involving regret, remorse or self-criticism, should not be read to admit anything even slightly probative of culpability.⁹³ That is because they do not express a stance incompatible with taking oneself to be faultless or non-culpable in the harm done. In particular, they can express one's self-criticism over having mispent efforts to avoid a result one is deeply invested in avoiding. It follows that apologies can involve deeply self-critical stances, which may be experienced painfully, while at the same time reflecting the apologizer's awareness that she was blameless.

⁹² See *supra* Part I.A.

⁹³ See *supra* Part II.

These arguments suggest that the practice of admitting apologies as evidence of liability, even only as partial evidence, is misguided, just as the new state measures err in failing to extend protection to them. Apologies, it follows, even at their most self-critical, should be inadmissible, and legislation should dramatically emphasize this. Such a conclusion would be too quick, however, for at least the following two reasons. First, some self-critical statements obviously do imply fault, such as when they include factual elements. A physician's admission that "I'm sorry I administered such a high dosage," for example, clearly concedes a key point of fact, and may be the victim's only access to the information as a means of extracting his rightful compensation. Most of the state reforms, to their credit, anticipate this concern, as they include clauses distinguishing putatively apologetic statements, which they protect, from admissions of fact that may accompany them. Still, it bears mention that any further extension of these protections to include self-critical statements, such as "I was wrong in doing that," or "I really should have tried something else," must, on pain of overreach, stop short of protecting clearly incriminating admissions, such as "What I did violated my professional guidelines." Self-criticism can slide into self-incrimination and any protective measures should probably take this into account.

Second, the arguments so far have dealt only with the implications or meanings of the *expressions* used in apologetic discourse, specifically self-critical expressions. They have not addressed another element, which also bears on admissibility: the fact that one has apologized or spoken self-critically. As J.L. Austin famously noted, apologies are performative utterances, ways of performing the act of apologizing.⁹⁴ That, in turn, has important implications for evidence law. The hearsay laws, along with exceptions deemed "admissions," apply only to expressions admitted for the "truth of the matter asserted."⁹⁵ In other words, they deal with semantic, rather than probabilistic, grounds for admitting evidence, inasmuch as they tie admissibility to whether a statement "admits" some point or other. To infer that a statement admits some point is to conclude something about what the statement means or how the speaker understood it, or expected it to be understood. It was on that basis that I have argued, so far, for the exclusion of morally self-critical statements such as "I behaved terribly." These types of remarks do not mean or imply that the speaker takes herself to have acted culpably or in some other way incompatible with her claim of faultlessness. To the contrary, I have argued, they are equally compatible with blameless behavior that happened to result in harm. For that reason, they should not be read as admissions.

⁹⁴ J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 87 (1962).

⁹⁵ FED. R. EVID. 801(c).

But the same statements may alternatively be introduced as evidence of the speaker's behavior, rather than admitted to state her position on some matter. Such utterances, in other words, may be brought as occurrences or facts that could make liability more probable. That someone apologized could, to use the language of the Federal Rules of Evidence, have a "tendency to make the existence of [a further] fact that is of consequence to the determination of the action [e.g. that one acted negligently] more probable or less probable than it would be" otherwise.⁹⁶ Notice that admitting apologies on this sort of ground would not necessarily depend on what the apologizer means to communicate with it. That someone threatened another with death, for example, could be admissible *not* to establish that she will, in fact, do what she threatened (the "truth" asserted), or even that she believes she will.⁹⁷ Rather, it may be admitted simply to show that someone issued a threat, which may make it more likely that she ultimately mistreated or harmed the victim, even in ways that had nothing to do with what she threatened.⁹⁸ Similarly, saying "I'm sorry I hurt you" may not be admissible to prove that someone hurt the victim or even that she is sorry, but it may be admissible to show that she apologized, which may indicate some greater likelihood of liability.

It is, in fact, an unsettled empirical question whether apologizing indicates any greater likelihood that the apologizer was culpable than had he not apologized. The culpable may be more likely to apologize, as they may judge their offenses worse and in more need of moral repair. It is this last possibility that warrants admitting apologies as evidence, even if not as party "admissions." And it may yet prove empirically correct. At this point, however, there remains some reason for doubt. For one, empirical findings suggest that factors unrelated to culpability determine who is more likely to apologize, as shown by the familiar phenomenon of the *overapologizer*. For example, a recent study confirmed the commonplace that women tend to apologize more than men do for the same offenses, whether they were outright wrongs or mere inadvertent inflictions of harm.⁹⁹ Moreover, one might expect that the culpable are *less* likely to apologize, inasmuch as they may be more defensive and fearful of incrimination than faultless injurers, or less concerned with duties to

⁹⁶ FED. R. EVID. 401.

⁹⁷ Roger C. Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis*, 65 MINN. L. REV. 424 (1980) (noting that these both satisfy the "assertion-oriented" and "declarant-oriented" grounds, respectively, for treating statements as hearsay).

⁹⁸ United States v. Burke, 495 F.2d 1226, 1231–32 (5th Cir. 1974).

⁹⁹ Karina Schumann & Michael Ross, *Why Women Apologize More Than Men: Gender Differences in Thresholds for Perceiving Offensive Behavior*, 21 PSYCH. SCIENCE 1649, 1652–53 (2010) (finding a gender difference in identifying an incident as an offense or as "apology-worthy" in the first place: women identified more offenses of all types as apology-worthy than men).

others, such as the duty to apologize, having flouted one already. The empirical question, in other words, remains open. But my point here is simply to raise the possibility that apologies *might* be admitted on these alternative grounds, rather than as admissions. In that case the arguments up to now do not yet address a potential, though so far unharessed, use of apologies to incriminate.

B. Reparatory Steps and Federal Rule of Evidence 409

If, however, we understand the evidentiary import of apologies in terms of behavior, rather than as expressions alone, they become strikingly similar to another kind of behavior already treated by the evidence rules. Steps at moral repair, notably offering to pay or compensate the victims of one's injurious conduct, or actually compensating them, are protected from use as evidence; under Federal Rule of Evidence 409, "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."¹⁰⁰ Notice that the rule refers to speech acts, such as offering or promising to pay, rather than merely the act of payment. Yet it is lumped with remedial actions more generally. The advisory committee notes explain the motivation behind the rule as follows: "the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."¹⁰¹ Although one can quibble with the empirical implications of "usually," the principle behind the explanation seems clear enough: these acts are motivated by a "humane impulse" and they aid the injured party.

In light of these considerations, then, it is anomalous that apologies are not included in such protection. Apologies, too, may often be offered from humane impulses, rather than as admissions of liability, and they play an important reparatory role for the injured party, even if not in repairing physical damage. Moreover, there is no imaginable construal by which an apology is more probative of culpability than these more substantial steps at moral repair: offering to pay for the damages seems, at least, no less reflective of one's guilt in causing them than the utterance of "I'm sorry." If these remedial steps merit protection despite their probative value, because of the positive motives they reflect and the positive steps they involve, then arguably so do apologies. That, at least, is what the rest of this section is meant to show: apologies, like offers to compensate, emanate from humane impulses and offer aid to the injured victim.

¹⁰⁰ FED. R. EVID. 409.

¹⁰¹ FED. R. EVID. 409 advisory committee's note.

One humane impulse that justifies apologizing, even for blameless harms, can be drawn from the emerging philosophical literature on apologies and their moral function. On a leading account, the mechanism by which apologies effect moral repair involves what has been labeled the "insult" view of wrongdoing.¹⁰² On this view, a wrongful act has a certain expressive function, apart from what it reveals about the offender. There is something insulting, on this view, in wronging someone.¹⁰³ That is not to suggest that the wrongdoer is communicating an insulting attitude or thought, or that the victim feels insulted. Rather, there is an *objective* notion of insult.¹⁰⁴

To illustrate the objective notion of insult, take the example of a friendship or partnership in which one person is always initiating contact, always managing the relationship. The other simply waits, receives, goes along. The "leader" is liable to regard the other's behavior as an insult. Of course, the other would say, "But I, too, value the relationship. I care about it too. Don't take it personally." But this response would be cheap, because what the "leader" finds insulting is her friend's *behavior*, not the thoughts or feelings that may lie behind it. The behavior, we could say, *treats* her as subordinate, or as less worthy of the friendship, even if it doesn't reveal that the friend judges her to be so. Treating someone as though she is less important, less valuable, is not the same as acting on a belief or feeling that this is the case.

On this view, the wrongful or harmful act is objectively insulting, or has an insulting implication for the victim that holds even if the offender clearly harbors no insulting attitude toward her. An apology, then, could be seen as reparational, retracting or contradicting the insult implied by the behavior.

It will be recalled, though, that the kinds of apologies under discussion are for inadvertent, blameless harms. It might be argued that, even construing insult objectively, there is nothing insulting about harming someone blamelessly, so apologies cannot be an appropriate mechanism for moral repair in such cases. They have nothing to repair, on this model. That response, however, overlooks an important fact about inadvertent harms. While inadvertent harms, as noted, lack the feature of

¹⁰² See Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, PHIL. & PHENOM. R. 62 (2001) (first articulating the idea that an apology corrects an insult); Adrienne Martin, *Owning Up and Lowering Down: The Power of Apology* (forthcoming) (Martin identifies this position as "the insult view," though she does not advocate it).

¹⁰³ See, e.g., JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 44–45 (1988).

¹⁰⁴ See Elizabeth Anderson & Richard Pildes, *Expressive Theories of Law* 148 U. PA. L. REV. 1503, 1527–28 (2000) (articulating the notion of "expressive harm," which is distinguished from "communicative harm" in that it involves actions which manifest an insulting, demeaning or otherwise undesired viewpoint regardless of what the agent who performs them actually feels or expresses).

being objectively insulting, in themselves, that status begins to change once the injurer, aware now of what he's done, ignores it, acting as though nothing untoward had happened. In particular, if he inflicts the harm and makes no effort to redress or apologize for it, *that* behavior or set of behaviors, unlike the mere harmful action alone, *does* arguably constitute an objective form of insult or slight or disrespect (it doesn't so much matter which). Harming someone and then not attempting to redress it treats the victim as though one is free to harm her in that way. And this treatment, or mistreatment, is objectively insulting and disrespectful, even if the initial harmful behavior was not. For example, if I uncontrollably spill hot tea on a stranger and walk on as though nothing has happened, then even if the spill itself involved no mistreatment or expresses nothing insulting, my continuing behavior amounts to taking him as someone I'm free to tarnish in that way. It doesn't reveal that I think that I'm free to do so, but it *treats* him as though I am. An apology, on this model, comes to correct, by taking a stance that repudiates, the insulting implication of harming a victim and leaving it in place.

It will be recalled that Federal Rule of Evidence 409 already protects a form of redress, namely compensation,¹⁰⁵ which is arguably another means of correcting the insulting implication of harming someone (even blamelessly). Why, then, extend that protection to apologies, as well? One reason is that apologies have value in moral repair over and above compensation. First, to pursue the insult model a bit further, merely compensating the victim of one's harmful behavior does not fully correct the objective insult. It could, alternatively, be seen as treating her as though she can be harmed for a price; harmed and then compensated. We see this kind of behavior most often in the way the powerful treat their subjects. Kings and employers routinely seize property or demand extra efforts and then, in a spell of benevolence or under the threat of legal action, pay their victims back. Yet even if they cover the physical cost, they do not treat their victims as people they were not free to harm or relieve of property and time. Instead, such behavior treats them as people one can harm and then pay at will, which is different. Harm and subsequent compensation is ambiguous: it could objectively express that the victim is fair game to be harmed and compensated.

Apology, then, unlike mere compensation, serves a distinctive moral reparatory function, by expressly repudiating the insulting implication otherwise put in place by harming someone and leaving the harm in place without full redress.¹⁰⁶ Such steps are not only morally right from the point of view of the agent's conduct ("from humane impulses"), but

¹⁰⁵ FED. R. EVID. 409.

¹⁰⁶ For an extensive argument in support of this claim, see Jefferey S. Helmreich, *Apologies for Blameless Actions* (June 3, 2011) (unpublished manuscript) (on file with the author).

appear to be valuable for the victims, as well. We can see this effect in individual examples. Charles Utley, a fifty-year-old San Diego engineer, discovered that doctors had carelessly left a sponge inside him after surgery.¹⁰⁷ Upon bringing it to the hospital's attention, he recalls, a surgeon told him: "No matter how this happened, I was the surgeon in charge; I was the captain of the ship and I was responsible and I apologize for this."¹⁰⁸ An administrator at Sharpe Health Care of San Diego also apologized to him.¹⁰⁹ As a result, Utley reported he was impressed and decided not to "bother hiring a lawyer."¹¹⁰ Instead, he settled directly with the hospital for an undisclosed amount which he says was far less than he might have been awarded in court.¹¹¹ His reason? "They honored me as a human being."¹¹²

Utley is apparently not alone in being willing to trade compensation for an apology. As noted in Part I, studies show that plaintiffs who sued their doctors say they would not have done so had they received an apology.¹¹³ Moreover, apologies seem to reduce lawsuits or bring them to a speedier close.¹¹⁴ Even if these incidents do not necessarily show that apologies are preferable to compensation as means of healing the victims (obviously not in the case of graver injuries), they illustrate that apologies play a distinctive reparatory role, apart from mere compensation. While compensating the victim may repair some of the physical damage, and even some of the disrespectful implications of having inflicted harm, it falls short of the manner in which apologies can honor and respect victims as people who may not be injured with impunity.

It will be noticed that none of what has been said here about the reparatory function of apologies requires that they be self-critical. That is partly because this section is concerned less with the evidentiary import of what apologies mean as statements, as raised by the "admission by party-opponent" designation, than with what is implied by the fact that one feels compelled to apologize at all. And the reasons to apologize for harming someone, when no fault is involved, need not involve the reasons to be self-critical of having done so. The disrespect, or insult, discussed here happens *after* the harm was done, whereas the self-

¹⁰⁷ Rachel Zimmerman, *Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry'*, WALL ST. J., May 18, 2004, at A1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Vincent et al., *supra* note 35 (reporting a British study finding 37% of those suing their physicians may not have done so had they received a "full" explanation and apology).

¹¹⁴ See Boothman et al., *supra* note 1, at 125.

criticism described in the previous section concerns one's behavior that inflicted the harm in the first place.

That said, I believe the two features discussed in this section and the last may be deeply related. First, self-criticism arguably enhances the reparatory effect of apologizing to victims. After all, a function of apologizing is to stop treating someone as though having harmed her is acceptable, something one can simply do and move on. Speaking self-critically about having done so amplifies the non-acceptance of it. Second, apologizing should be sincere, whatever its function or purpose. And an apology for a harm one is uncritical of having inflicted may strike victims as decidedly insincere. Consider: "I'm sorry for what I did but I'm above reproach," or "I'm sorry, but I'm completely pleased with myself over what I did." Such statements sound contradictory, or at best defective as apologies. Self-criticism may be necessary for apologies to come across as sincere and so to be of some benefit to the victims.

In fact, as noted, some empirical evidence suggests that self-critical apologies are much more effective in practice. Robbenholt found that partial apologies, including "I am so sorry that you were hurt. I really hope that you feel better soon," were far less likely to encourage victims to settle than self-critical ones ("I am so sorry that you were hurt. The accident was all my fault. I was going too fast and not watching where I was going until it was too late.").¹¹⁵ In fact, mere apologies, with no self-criticism at all, seemed to have a less positive effect on victims than the absence of an apology.¹¹⁶ The implication appears to be that expressing self-criticism gives apologies a more positive impact on victims. And, as noted, the purpose of apologies is to treat victims a certain way, or cease treating them as people one is free to harm as one did.

C. *Toward a Solution*

We can see, then, that apologies share key elements with the acts, including the speech acts, protected by existing rules of evidence: they proceed from a humane impulse, namely the intention not to treat the victim as one who may be harmed; they imply no admission of fault, as there is reason to apologize even for blameless harms; and they aid the victims in ways that compensation alone does not. These facts suggest including apologies as acts of moral repair protected by Rule 409 and analogous state rules, or any statutory protection modeled thereon.

¹¹⁵ Robbenholt, *supra* note 38, at 484–86.

¹¹⁶ *See id.*

1. Protecting Factual Incrimination

There are, however, three challenges that legal protection should overcome. The first has already been mentioned. Recall that one motivation for limiting the protection of apologies was that they may involve or accompany factual admissions of great probative value, such as conceding that a certain action was taken, or an important standard violated. To preserve that value, any protection of apologies would need to exclude admissions of factual elements of the tort or crime in the case. Fortunately, Federal Rule of Evidence 409 (and, for that matter, most of the state protections) was designed for just such an exclusion. The notes of the advisory committee state:

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.¹¹⁷

On this model, apologies would be protected while any coincident admission of fact, such as that one behaved negligently, would remain admissible. That may not be so easy to preserve in practice, however. One might worry that the distinction between self-critical expressions ("I should have behaved differently," or "I should not have treated the patient that way") and factual admissions of fault is rarified. Unlike offers to pay, these allegedly non-factual remarks verge on claims about one's competence or compliance with acceptable standards, which do, in fact, bear on culpability. This worry does not, however, appear to be worth the benefit of admitting evaluative statements about one's own behavior. The reason is that even when courts have admitted such personal evaluations, they proved to have limited probative value, much for the reasons just stated. Thus, a surgeon's apologizing for having done an "inadequate resection" and for failing to do better,¹¹⁸ a doctor's admission that he "made a mistake,"¹¹⁹ and a homeowner's statement that an accident on his premises was "my fault"¹²⁰ were taken as evidence of personal standards of conduct, rather than as proof of objective negligence. If a

¹¹⁷ FED. R. EVID. 409, advisory committee's note.

¹¹⁸ *Phinney v. Vinson*, 605 A.2d 849, 849 (Vt. 1992).

¹¹⁹ *Senesac v. Assocs. in Obstetrics & Gynecology*, 449 A.2d 900, 903 (Vt. 1982).

¹²⁰ *Trulove v. Jones*, 610 S.E.2d 649 (Ga. App. 2005).

rule of evidence like Federal Rule of Evidence 409 were to automatically render such statements inadmissible, there would likely be little cost in probative evidence, particularly if factual admissions as to causation were preserved.

And, as noted earlier, self-critical expressions such as “I did something terrible” or “I feel so guilty about what I did” do not indicate culpability. By themselves they merely reflect a moral agent’s sense of having failed to direct his best efforts in a manner that actually yielded the result in which he was deeply invested: not harming another person. While this sentiment is compatible with regarding oneself culpable and at fault, it is equally compatible with taking oneself to be morally blameless. Such expressions, too, like the speech acts they reflect, could be protected in an expanded version of Federal Rule of Evidence 409, or a legislative reform modeled upon it.

2. Prompting Insincere Apologies

The second challenge to protection concerns its anticipated effects on apologies. If apologies were to become not only advantageous but legally risk-free, goes this worry, they may be offered insincerely. This mimics a wider concern with the “legalization” of moral requirements, be they apologies or promise-keeping or duties to friends and family. As Lee Taft puts it, “when apology is cast into the legal arena, its fundamental moral character is dramatically, if not irrevocably, altered.”¹²¹ An important part of moral activity such as apologizing is, arguably, acting for the right reasons and in the right state of mind. For apologies, in particular, an essential intentional condition is, arguably, making oneself vulnerable: when we apologize, we intentionally open ourselves to the victim’s rebuke, resentment or even just the recognition of our moral indebtedness. Performing the act this way may enhance its power and poignancy, as it realizes a dramatic departure from a way of treating the victim that expressed insensitivity and perhaps a sense of superiority. Yet when the law “steps in” and creates its own set of incentives and disincentives, the crucial intentional state behind an act like apologizing is arguably compromised, even corrupted.

This is a serious concern, but it may seem less moving when considered in light of the alternatives to the protection proposed here. First, someone who protection would encourage to apologize insincerely would probably not apologize at all if the practice were left unprotected. And it is not clear that offering no apology for injuring someone is preferable to apologizing insincerely. Adopting an apologetic stance towards a victim, for whatever reason, may have value over and above the psy-

¹²¹ Taft, *supra* note 5, at 1136.

chological state it expresses, which may justify preserving the practice even at the risk of insincerity.

Suppose, though, that encouraging insincere apologies is, all else equal, an unwelcome cost of protection (or, more accurately, of protection together with the known conflict-resolving effects of apologies). This cost, then, would nevertheless accompany a countervailing benefit that motivated protection in the first place: proper, sincere apologies are, at present, discouraged by their admissibility as evidence, and protection might induce them. So the risk of protection turns, in part, on what portion of the apologies it encourages or enables are defective. Would it spur apologies that are proper, sincere but at present inhibited by fear of litigation, enough to outweigh the insincere apologies it may likewise encourage at the same time?

In addressing that question, it is worth recalling that if the arguments offered here are right, protection merely frees apology from a legal distortion. It prevents the law from inferring or signaling that apologies are *more* incriminating than they really are. Protection, in other words, counters a tendency on the part of legal actors and institutions to *misread* apologies. But it does not reward them; once offered, and freed of the risk of incrimination, they remain fraught with the same humbling implications for the apologizer: she opens herself to rebuke, a sense of moral indebtedness, or the natural vulnerability that comes from acknowledging to one's victim that one should have acted differently. Rather than encourage apologies, then, protection is more properly perceived as removing an artificial and inappropriate disincentive to apologizing, one based largely on misconstruing the speech act as admitting or indicating fault.

What does indisputably encourage apologies, perhaps artificially and perniciously, is the growing appreciation of their power. Apologies appease victims like Utley,¹²² sometimes enough to dissuade them from litigating a worthy claim. That benefit of apologizing no doubt lies behind some of the legislative drives for protection, as well as countless insincere corporate apologies. The conflict-resolving power of apology, however, persists regardless of evidentiary protection and its tendency to encourage insincere contrition is perhaps inevitable. The same might be said of other acts of moral repair, such as offering to compensate victims. If, however, these sorts of acts continue to be protected on grounds that they are both valuable and, on their face, non-incriminating, the same grounds apply to apologies, as well. That is the extent of my argument.

¹²² See *supra* notes 107–12 and accompanying text.

3. Over-Discouraging Lawsuits

Even if, however, we grant the sincerity of the apologies that, with the aid of the proposed protection, help to settle legal and moral disputes, there remains the question of whether they *should* be allowed to do so.¹²³ The law of torts was arguably put in place to correct for injustices in the distribution of burdens and benefits that result from injury.¹²⁴ When one person tortiously harms another, on this view, something is wrong with the world; a victim is made to bear a cost that should more rightfully be borne by another. Remedy in tort enables some redress of this injustice: put crudely, it helps make right what was wrong with the world, as just described.¹²⁵ That the victim be compensated is, in other words, a desirable result, quite regardless of whether she chooses to claim and pursue the remedy due her. Indeed, many victims with legitimate claims are often too demoralized or depressed or otherwise debilitated to pursue them, but that hardly means they should refrain from doing so. Indeed, they should more plausibly be encouraged.

If so, the law of evidence would serve an undesirable result if it were to protect apologies to the point that they encourage victims to bear costs they may rightfully shift. That poses a serious challenge to the protection proposed here. Two cautionary responses are in order, however. First, the alternative to protection is not a status quo in which worthy lawsuits are pursued despite apologies. It is, rather, a situation in which even *unworthy* lawsuits, like those pursued against blameless physicians, for example, may exploit self-critical apologies unjustly, by mis-casting them as evidence of liability. It is also a situation in which even worthy lawsuits may exploit non-probative apologies, and thereby deter the practice of apologies even by faultless injurers in future cases who owe no compensation. Whether protection from this abuse of apologies will limit as many worthy claims as unworthy ones is an empirical question bearing further research, as is the question of how many helpful, worthy and effective apologies the current evidentiary practice deters. Without knowing the answers, though, it is premature to assume that correcting for evidentiary misinterpretation will serve to quell worthy lawsuits, at least to a degree that is not outweighed by the desirable results of encouraging appropriate apologies.

¹²³ Thanks to Seana Shiffrin for bringing this worry to my attention.

¹²⁴ See, e.g., H.H. JOACHIM, ARISTOTLE: THE NICOMACHEAN ETHICS, A COMMENTARY 144–145 (D.A. Rees, ed., 1951); Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 357 (1992); Ernest Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 280 (1994).

¹²⁵ See, e.g., Weinrib, *supra* note 124, at 285–86 (arguing that tortious “action that breaches [a duty of care] produces a gain to the injurer and a loss to the person injured; then the court restores the parties to the equality that would have prevailed had the norm been observed”).

Second, it is unclear whether justice is better served when a victim forgives a tortious injury than when he shifts the cost to his injurer.¹²⁶ It is a matter of ongoing controversy¹²⁷ whether tort law serves a kind of justice, in which case it is better that costs be shifted no matter what the victim wants, or merely a kind of right, in which case the mere *existence* of the right to recompense realizes the core aims of tort law, even if she chooses not to claim it.¹²⁸ Needless to say, if tort promotes rights more than justice, then apologies could be seen to respect and reinforce those rights even if the victim does not claim them. Even if, however, we assume worthy claims should be enforced as a matter of justice, it does not necessarily follow that evidence ought to be misinterpreted or misused to do so. My argument here is mainly against misinterpreting full, self-critical apologies, admitting them on false pretenses or failing to appreciate their resemblance to other acts of moral repair that are protected by the rules of evidence.

Finally, it should be clarified that the focus on rules of evidence here is not meant to rule out state reforms, instead, as means of protecting self-critical expressions, including apologies, both as statements and as speech acts. Indeed, it is far more realistic to expect that such reforms, rather than a rule of evidence, might be amended to include expressions of self-criticism, and to extend beyond expressions to the act of apologizing itself. And like Rule 409, the state reforms already contain language separating admissions of factual elements of liability from purely apologetic expressions.¹²⁹ The preceding discussion of the rule was meant only to bring out a more general point: that apologetic statements and actions are worth protecting even in the case of full, self-critical apologies, because as statements they imply nothing incriminating and as actions they are valuable means of moral repair of a sort that is already protected from use as evidence. For these reasons, evidence law should make more explicit room to protect full, self-critical apologies.

¹²⁶ See, e.g., Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387, 388–389 (David G. Owen ed., 1995) (acknowledging that it seems unfair to impose the entire burden on the victim, but if the harm was inflicted in a sufficiently blameless manner, perhaps the injurer should not bear the cost either).

¹²⁷ See, e.g., John Goldberg & Benjamin Zipursky, *Tort Law and Moral Luck*, 92 *CORNELL L. REV.* 1123, 1128–43 (2006) (summarizing the controversy).

¹²⁸ See Gregory C. Keating, *The Priority of Respect over Repair*, *LEGAL THEORY* (forthcoming 2012) (offering a new theory of tort law with less emphasis on remedying wrongful harm); see also Jeffrey S. Helmreich, *Making Rights and Making Right: Where Tort Law Strays from Corrective Justice* (April 20, 2009) (unpublished manuscript) (on file with the author).

¹²⁹ See, e.g., D.C. CODE § 16-2841 (2010) (“an expression of sympathy or regret . . . is inadmissible as an admission of liability. Nothing herein shall preclude the court from permitting the introduction of an admission of liability into evidence”).

CONCLUSION

For all their limitations, the new apology laws mark a significant step in harnessing the value of apologies for legal benefit. They draw the attention of lawyers and jurists to a development that can potentially transform legal culture and practice, namely the power of apologies to resolve conflict and settle claims. They also explicitly undermine the fear of legal reprisal that might otherwise discourage injurers from showing their victims that they care, feel bad about what happened, and want to help. Finally, the new reforms shatter any lingering dogma among legal advisors that their clients should never cede ground to their victims, even if only to say they sympathize. For these reasons, the new state measures merit significant appreciation and attention.

At the same time, the decisive majority of these reforms read as though there are only two types of apologies: spineless expressions of sympathy and benevolence, on the one hand, and outright admissions of fault, on the other. The prevailing legal practice of admitting apologies, which predated and continues alongside the apology laws, vindicates the same claim. The implication is that full apologies, which express displeasure or self-criticism about one's own behavior, admit at least some fault in the outcome. A large portion of this Article was devoted to refuting that contention. Drawing on the work of moral theorists such as Bernard Williams and Harry Frankfurt, I tried to show that there are grounds to be self-critical, deeply and painfully so, even for harming someone without fault. The thesis was that even blameless injurers, if they are not negligent, are often deeply invested in not harming people, expending much effort to reduce the danger they pose to others. Consequently, they view their injurious conduct as failed attempts to avoid an outcome they were deeply invested in avoiding. That, I tried to show, grounds a self-critical view of blameless harms, one that is aptly expressed by guilty or remorseful apologies, without implying any culpability.

In sketching this account of how blameless injurers may take a self-critical stance, this Article dealt with a somewhat idealized model. The picture offered here focused on several features of moral agency that grounded, or warranted, a certain stance toward one's harmful behavior, even when it was blameless. The account was not, however, an attempt to capture fully the actual psychology of people who blamelessly harm others. There is arguably much more that can be said about their moral anguish. To follow an idea of Herbert Morris's, moral agents may deeply value the welfare of others and, consequently, they may feel guilty about damaging something they so cherished.¹³⁰ Or else they may

¹³⁰ Morris, *supra* note 75, at 226.

be so invested in avoiding particular harms that the goal is experienced as a duty, which one must fulfill on pain of guilt and moral reprobation.

Something similar can be said about the account offered in the final part, describing a benefit that victims derive from receiving an apology from their blameless injurers. There, too, I dealt with a moral feature of harming others that made sense, abstractly, of the need to apologize fully even for blameless harms. It may, nevertheless, vastly under-describe the grievance actually experienced by victims of inadvertent harms, and the pleasure or relief they would get from hearing their injurers apologize. Much can be gained, therefore, from further empirical study of the human experience of blamelessly harming another, or suffering harm at the morally clean hands of someone else. The results will inevitably enrich and transform the theoretical moral account that was attempted here. If the legal protection of apologies ever approaches the level proposed in the final section of this Article, there will be greater opportunity to observe some of those experiences and learn from them. At the very least, they will be better served by the laws of evidence.

